IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 989 OF 2006

Kiritkumar Narayanbhai Bhatt. ... Appellant.
Versus.
Brihanmumbai Municipal Corpn.
and another. ... Respondents.

Shri M.P.Vashi i/by M/s.M.P.Vashi & Associates for the Appellant.

Shri J.J.Xavier for the Respondents.

CORAM : ABHAY S.OKA, J.

DATED : 4th August, 2006.

P.C.:

1. Admit. The Advocate for the Respondents waives service. The affidavit of the Constituted Attorney of the Appellant is taken on record and marked "X" for identification.

2. The Appellant is the original Plaintiff. The Appellant filed a suit in the City Civil Court at Mumbai for challenging Notice dated 27th July 1999 issued by the Respondent No.1-Corporation to the Appellant under section 351 of the Municipal Corporation Act, 1888 and the order dated 14th October 1999 passed on the basis of the said notice. The notice relates to the construction of a mezzanine floor or loft on existing structure made up of B.M.Walls and A.C.Sheet roof. The said notice was

replied by the Appellant by contending that the structure of the mezzanine floor was in existence prior to the year 1961-62. The said contention was not accepted by the concerned Ward Officer while passing the order dated 14th October 1999 and therefore, a direction for demolition was issued.

3. The trial Court dismissed the suit filed by the Appellant. The trial Court held that the Appellant failed to establish that the offending structure was in existence prior to the year 1961-62.

4. Shri Vashi appearing for the Appellant submitted that the Appellant may have failed to establish that the offending structure was in existence in the year 1961-62, but there is a policy of the Respondent-Corporation for tolerating the mezzanine floors which are in existence on 15th August 1997. It is submitted that there is evidence on record to show that the mezzanine floor in dispute was in existence on the said date and therefore, the same is required to be protected by the policy adopted by the Respondent-Corporation. He stated that the Appellant has given up his claim that the offending structure was in existence prior to the datum line i.e. prior to 1061-62 and the Appellant is confining his case for protecting the suit structure only on the basis of the policy adopted by the

Respondent-Corporation. An affidavit to that effect has been filed by the Constituted Attorney of the Appellant which is taken on record and marked as "X" for identification.

5. Shri Xavier appearing for the Respondent submitted that the policy does not apply to the mezzanine floors which are not in existence as on 15th August 1997 and the policy will apply only where other conditions which are incorporated in the policy are satisfied. He submitted that there is no evidence on record to show that the mezzanine floor was in existence on the date contemplated by the said policy.

6. I have considered the submissions. There is a clear finding recorded by the trial Court that the Appellant could not establish the existence of the offending structure before the datum line. In fact the said case is now expressly given up by the Appellant and the only contention which is raised is that the mezzanine floor deserves to be protected as the same was in existence as on 15th August 1997 and the policy of the Respondent-Corporation protects the mezzanine floor.

7. The Appellant went before the trial Court with a specific case that the structure was in existence in 1961-62. In fact that was the case made out by the

Appellant by way of reply to the suit notice. According to the Appellant, there is evidence on record to show that the mezzanine floor existed on 15th August 1997. However, the plea on the basis of the policy of the Respondent-Corporation was not incorporated in the plaint. However, the fact remains that there is a policy which protects certain category of mezzanine floors existing as on 15th August 1997 provided other conditions of the policy are satisfied. Whether the mezzanine floor in question was in existence on the relevant date or not and whether the other conditions of the policy satisfied or not are essentially the questions of fact which will have to be established on evidence. The notice is issued in the year 1999 to which reply was submitted that the mezzanine floor was in existence for number of years. While considering the reply, the concerned officer of the Respondent -Corporation has not considered the case of the Appellant in the light of the policy as the same was not in existence when the officer passed an order on the show cause notice. Therefore, this is a case where an opportunity should be made available to the Appellant to establish that he is covered by the policy adopted by the Respondent-Corporation. For deciding the said question of fact, an order of remand will have to be passed with liberty to the Appellant to carry out necessary amendment to the plaint. After remand the

only question which will be decided is as regards the applicability of the policy to the mezzanine floor in question. Now the Appellant cannot contend that his structure is in existence prior to the datum line or that the structure was constructed after obtaining a prior permission.

7. Hence the following order is passed:

(i) The impugned decree of dismissal of L.C. Suit No.6454 of 1999 is set aside and the suit is restored to file of the trial Court.

(ii) The parties are directed to appear before the trial Court on 29th August 2006 at 11.00 a.m. for fixing the schedule of hearing.

(iii) The Appellant is free to apply to the trial Court on that day for amendment of the plaint for relying upon the policy. The Respondents will be free to file their additional written statement.

(iv) It is clarified that the findings which were recorded earlier by the trial Court

that the suit was maintainable even in the absence of statutory notice under section 527 of the said Act and that the construction of the offending structure was carried out without any permission are confirmed and the only issues which are required to be decided are whether the offending structure was in existence prior to 15th August 1997 and whether the policy of the Respondent-Corporation as regards tolerating mezzanine floors will apply to the offending structure.

(v) The parties are permitted to lead further evidence in addition to the evidence already on record for the purpose of deciding the aforesaid issues.

(vi) The trial Court will conclude the trial as expeditiously as possible and preferably by the end of February 2007.

(vii) Till disposal of the suit, the interim order which was operating during the pendency of the suit will continue to operate. The Appellant will also maintain statusquo in all respects in respect of

the offending structure till disposal of the suit.

(viii) The parties concerned and the Court to act on the authenticated copy of this order.

Judge.